Apex Paper Box Company and its Subsidiaries Boxit Corporation, Western Reserve Packaging, Inc., North Coast Box & Container Corporation and Color Tech Coating & Finishing Company *and* Local 170, International Ladies' Garment Workers' Union, Petitioner. Case 8–RC–14247

March 15, 1991

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT, DEVANEY, OVIATT, AND RAUDABAUGH

On June 22, 1990, the Regional Director for Region 8 issued a Supplemental Decision and Certification of Representative in the above-entitled proceeding, in which he sustained the challenges to ballots cast by three employees laid off prior to the payroll eligibility period and rehired by the Employer prior to the election. In so doing, the Regional Director found the three laid-off employees ineligible to vote as they had no reasonable expectancy of recall as of the payroll eligibility date. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely Request for Review of the Regional Director's decision. In its Request for Review, the Employer in effect argues that inasmuch as the employees were recalled prior to the election date, they had a reasonable expectancy of recall as of the payroll eligibility period and they were, therefore, eligible to vote. We grant the Employer's Request for Review, as it raises a substantial and material issue.

The Board has considered the entire record in this case and finds the following:

The Employer manufactures retail packaging materials at its facilities located at the Apex Paper Company on Walworth Avenue, Walford Avenue, Monroe Avenue; Boxit Corporation on Walworth Avenue; Western Reserve Packaging on West 65th Street; Color Tech Coating and Finishing Company on Berea Road; and North Coast Box & Container Corporation on Almira Avenue in Cleveland. Prior to December 1989, the Employer had an additional facility located on Sobieski Avenue in Cleveland, Ohio, referred to as the Puritas Packaging (Puritas) facility. At the Puritas facility, the Employer employed between 40 and 44 employees and manufactured boxes similar to those made at its Apex facilities. On December 18, 1989, a fire occurred at the Puritas facility, which almost completely destroyed the building, machinery, and equipment. Immediately following the fire, the Employer found positions at its other facilities for three supervisors and one mechanic from Puritas. Of the remaining employees, seven, including the three whose votes have been challenged, had been recalled prior to the March 30, 1990 election date.[1] Employee Miller was recalled on February 28, 1990, employee Hensley was recalled during the first week in March, and employee Harris was recalled about the same time as the other two. Each employee received credit for his or her previous work experience with respect to benefits, vacation time, insurance, and seniority, and pay rate progression was computed from the date of original hire. None of the disputed employees was working at any time during the payroll eligibility period.

According to the Employer, its production needs had not changed after the fire, no accounts had been lost, the market remained as strong as it had been, and production requirements remained at the same levels. The Employer stated that it had planned to recover its lost production capacity as quickly as possible using the existing employees. The testimony, however, establishes that when and where to resume production were not within the Employer's control. David Meyerson, the Employer's general counsel and director of human resources, testified that the facility was ''a total loss,'' and that at the time of the fire, the Employer ''did not know what was going to happen.'' Although an additional machine was installed at an Apex facility to recapture some of Puritas' lost production capacity, Meyerson testified that the Employer had neither the means nor the ability to recoup the lost manufacturing; there was no room for additional machinery at the other facilities, the machines themselves were unavailable, and there were no formal plans for rebuilding Puritas or expanding the existing facilities.

After the fire, at Meyerson's direction, Bob Downing, the Employer's personnel manager, informed the employees that they had lost their jobs because of the fire. Downing advised the employees to complete job applications if they were interested in positions at the Apex facility. The employees were also told, however, that there were only a limited number of openings currently available at other facilities—the actual number was unknown. The Employer encouraged the laid-off employees to remain in contact if they wished to be recalled; employees were told that if they had any questions or wanted to know what was going on, they should contact the personnel department. The Employer did not at any time prior to the end of the payroll eligibility period communicate with the laid-off employees regarding the availability or status of work but did maintain a recall list. Following the payroll eligibility period and prior to the election, every qualified Puritas employee who filled out an application was recalled; the total number of recalled employees represented approximately 35 percent of the Puritas work

[1] The Employer attempted to recall four other employees prior to recalling the three disputed employees. However, these individuals were unavailable for work; either they could not be reached or they had already obtained other employment.

force. Employees who returned to work were recalled solely because of employee turnover, i.e., as a result of an employee quitting or leaving Apex.

The Employer has no formal policy or past practice of recalling laid-off employees. During the busy season in 1989, the Employer hired temporary employees at another of its divisions. These temporary employees were informed that there was no basis for them to expect to be recalled. In January 1990, the Employer advised these temporary employees to apply for unemployment benefits and they were not asked to complete employment applications for jobs at other of the Employer's facilities.

The issue on review is whether three of the laid-off employees are eligible to vote. It is well established that temporarily laid-off employees are eligible to vote. The voting eligibility of laid-off employees depends on whether objective factors support a reasonable expectancy of recall in the near future, which establishes the temporary nature of the layoff.[2] The Board examines several factors in determining voter eligibility, including the employer's past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall.[3] The Employer argues that the reasonableness of the laid-off employees' expectation of recall is determined as of the date of the election; consequently, rehiring the laid-off employees prior to the election establishes the required ''expectancy'' and, therefore, they are eligible to vote.

The Board has long held, however, that employees must be employed both during the payroll eligibility period and on the election date to be eligible to vote in an election.[4] The date-certain test for determining voter eligibility fosters predictability and stability in the election process and simplifies the process of identifying eligible voters. *NLRB v. Town Wood Datsun*.[5] A prerequisite that employees on lay off as of the payroll eligibility period have a reasonable expectation of recall as of that time, is consistent with the date-certain test and prevents an employer from manipulating factors relating to the likelihood of recall between the eligibility and election dates.[6] Further, the utility and policing of the *Excelsior*[7] list would be compromised if eligibility to vote could be satisfied by employment on the date of the election. Thus, employees laid off prior to the payroll eligibility period must have had a reasonable expectation of recall as of the payroll eligibility period in order to be eligible to vote in the election, regardless of whether the employees have been recalled prior to the election.[8] *Tony's Trailer Service*, 257 NLRB 878 fn. 3 (1981).

Our dissenting colleagues, however, would have us conclude that the recall of laid-off employees prior to the election, but after the payroll eligibility period, perforce establishes the temporary nature of the layoff, obviating the need to evaluate the employees' expectancy of recall. We believe this to be illogical, because the occurrence of subsequent events (including the fortuitous recall of laid-off employees prior to the election date) cannot change the expectation of recall that actually existed during the eligibility period. The subsequent recall of laid-off employees prior to the election does not, in and of itself, require the conclusion that the layoff is to be regarded at all material times as temporary, any more than the recall of a laid-off employee soon after the election establishes that the layoff should be viewed as temporary as of the date of the election. We note that even our dissenting colleagues would not wholly disregard employment status as of the payroll eligibility period—at least regarding newly hired employees. Our dissenting colleagues' distinctive treatment of laid-off employees, however, raises the additional question of whether they would find eligible a laid-off employee with no expectation of recall as of the traditional payroll eligibility period, who, due to unexpected changed circumstances developed a demonstrable expectation of recall by the election date. In *Gerber Plastic Co.*, 110 NLRB 269 (1954), the Board considered, postelection, the eligibility of two laid-off employees who had been rehired after the eligibility date but prior to the election for jobs substantially different from those they had performed prior to their layoff. The Board found these employees ineligible to vote, concluding that as these employees had been permanently laid off before the eligibility date, it was immaterial that they were rehired for different jobs to fill unexpected vacancies prior to the election.[9]

[2] *Sol-Jack Co.*, 286 NLRB 1173 (1987); *Higgins, Inc.*, 111 NLRB 797 (1955). It is well established that permanently laid-off employees, i.e., those employees with no reasonable expectation of recall, are ineligible to vote.

[3] See, e.g., *S & G Concrete*, 274 NLRB 895 (1985); *D. H. Farms*, 206 NLRB 111 (1973).

[4] See, e.g., *Gator Products*, 250 NLRB 282 (1980); *F. & M. Importing Co.*, 237 NLRB 628 (1978); *Plymouth Towing Co.*, 178 NLRB 651 (1969).

[5] 767 F.2d 350 (7th Cir. 1985).

[6] We note that many of the Board's prior cases loosely refer to an employee's reasonable expectation of recall as of the ''date of the election,'' e.g., *Sol-Jack Co.*, 286 NLRB 1173 (1987), or ''at the time of the election,'' e.g., *Data Technology Corp.*, 281 NLRB 1005 (1986). Such cases, however, usually involve the eligibility of voters who remained in layoff status on and after the date of the election and, therefore, their expectancy of recall on this latter date was likewise relevant. Cf. *Southwest Distributing Co.*, 232 NLRB 635, 637 (1977). If laid-off employees do not have a reasonable expectation of recall as of the date of the election, it is clear that such employees would be ineligible to vote.

[7] *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Co.*, 394 U.S. 759 (1960). The list furthers access to voters. Total accuracy cannot be expected, but building in ''error'' should not be encouraged.

[8] *Wyman-Gordon Co.*, 123 NLRB 1007, 1008 (1959) (emphasis in the original) (the Board found that although most of the laid-off employees were recalled after the election, ''on the eligibility date the challenged voters did not have a reasonable expectation of reemployment'').

[9] In so doing, the Board overruled *Sylvania Electric Products*, 91 NLRB 296 (1950), and the cases on which it relied, *Whitcomb Locomotive Co.*, 60 NLRB 1160 (1945), *St. Joseph Lead Co.*, 66 NLRB 560 (1946), and *Holeproof Hosiery Co.*, 67 NLRB 1397 (1946), insofar as they were inconsistent with its

In the instant case, the evidence establishes that the three laid-off employees had no reasonable expectation of recall as of the payroll eligibility date. According to Meyerson's testimony, the Puritas operation was ''a total loss,'' including the plant, machinery, and equipment. Layoffs under such circumstances appeared to be of a permanent nature and expectation of recall was less than reasonable. Further, although there was no question but that the Employer intended to resume production as soon as it was able, there was no evidence whatsoever that the Employer intended to rebuild the destroyed facility or purchase a new facility. Further, it was uncontradicted that the Employer anticipated that it would be unable to recapture its lost production at other facilities. Meyerson testified that the Employer's other facilities could not absorb more labor, and that the necessary machinery was unavailable. By the time of the hearing, the Employer had managed to add only one more machine at its Apex facility. The Employer's expected inability to make up for lost production seriously diminished the reasonableness of any expectation of recall.

In addition, the Employer does not have a practice of recalling laid-off employees. Employees were advised that they were laid off because of the fire, and that they should fill out applications if they wished to work in one of the Employer's other facilities. The employees, however, were also advised that there were only a limited number of openings, if any, and they were given no information regarding when they might expect to be recalled, which further supports the conclusion that the employees had no reasonable expectation of recall. In the absence of evidence of past practice regarding layoffs, where an employee is given no estimate as to the duration of the layoff or any specific indication as to when, if at all, the employee will be recalled, the Board has found that no reasonable expectancy of recall exists. *Foam Fabricators*, 273 NLRB 511 (1984).[10] Finally, the evidence indicates and the Employer admits that the employees were recalled solely because of attrition rather than because of its ability to recapture production or the machine added to the Apex facility.[11]

Accordingly, we agree with the Regional Director's conclusion that the three employees laid off prior to the payroll eligibility date, and recalled prior to the election, were ineligible to vote in the election and, therefore, that the challenges to their ballots should be sustained. *Tony's Trailer Service*, supra.[12]

ORDER

The Regional Director's Supplemental Decision and Certification of Representative is affirmed.

MEMBER CRACRAFT, dissenting.

Contrary to my colleagues, I would find that the three employees who were laid off before the eligibility period and recalled to substantially equivalent positions prior to the election were only temporarily laid off and therefore eligible to vote in the election.

It is well established that an employee must be employed and working in the unit on both the eligibility and the election dates unless the employee was absent for reasons specified in the direction of election.[1] The Board's standard direction of election states, ''Eligible to vote are those employed during the payroll period . . . including employees who were . . . temporarily laid off.'' Although the general test for temporary lay off is, as my colleagues state, reasonable expectancy of recall, the test is not infallible but a prediction, i.e., a prediction that the employee will likely be recalled in the near future.[2]

My colleagues, in effect, apply this predictive test to find that the employees did not have a reasonable expectancy of recall and therefore are not eligible to vote.[3] My colleagues, by applying the reasonable expectancy test to employees who were recalled prior to the election, are, however, confusing the test with the event being tested for. The issue is whether the em-

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decision in *Gerber*. In *Sylvania*, the layoff of employees rehired after the payroll eligibility date had been deemed temporary because they were rehired prior to the election date and, therefore, the employees were eligible to vote. The Board reaffirms its holding in *Gerber*, including overruling *Sylvania* and the cases it relied on to the extent they are inconsistent with *Gerber* and this decision.

[10] When other factors involved do not support an employee's having a reasonable expectancy of recall, statements indicating possible recall may not overcome the totality of the evidence to the contrary. *S & G Concrete Co.*, 274 NLRB 895 (1985). In *Precision Tumbling Co.*, 252 NLRB 1014 (1980), the objective factors negated the reasonableness of any expectancy based on what the employees had been told.

[11] Member Cracraft would distinguish *Gerber Plastic* on the basis that there, the employees were recalled to different jobs, not to former positions. In *Barr Rubber Products Co.*, 118 NLRB 1428, 1430 (1957), however, the Board specifically declined to narrow *Gerber*'s holding on the basis advocated by the dissent, but instead reemphasized that the *Gerber* result was reached because employees had been permanently laid off.

[12] The Employer also argued that the Regional Director erroneously accepted P. Exhs. 5 and 6 into evidence. Exh. 6 is a February 20, 1990 letter from the Employer's representative, which was distributed to the employees. The letter sets forth the Employer's position at the preelection hearing and states that ''it was discussed whether the Puritas employees would be allowed to vote. The Union readily agreed with our [the Employer's] position that because of the fire, the Puritas employees did not have a reasonable expectancy of being recalled to work.'' Exh. 5 is the Employer's posthearing brief in which the Employer speculated as to why the Petitioner amended its petition. The Employer argued that these documents merely contained the Employer's legal positions and, therefore, were irrelevant and did not constitute evidence. The standard for admissibility of evidence is relevance. The Employer has failed to demonstrate that evidence relating to whether it intends or is able to recall employees is irrelevant, or that the Regional Director abused his discretion by accepting Exhs. 5 and 6 into evidence. In any event, the Board would reach the same conclusion here even if these exhibits were not considered.

[1] *Ra-Rich Mfg. Co.*, 120 NLRB 1444, 1447 (1958); *Barry Controls*, 113 NLRB 26, 27–28 (1955).

[2] When the test predicts the employee is likely to be recalled, the employee has a continuing interest in the unit and is eligible to vote.

[3] I agree that at the time of the layoffs the employees did not have a reasonable expectancy of recall. The plant in which they had been working burned down. The employees, however, were recalled to one of the Employer's other plants included in the unit.

ployees in question were temporarily or permanently laid off, not whether they had a reasonable expectancy of recall. Thus, I would find the test inapplicable where, as here, the employees were recalled prior to the election. As the event—recall—has occurred, no predictive test is needed. Because the employees were recalled and working in substantially equivalent unit positions prior to the election, their layoffs were perforce temporary. Or to state it differently, the fact that the employees were recalled overrides the test's prediction.

My colleagues also find that, because the employees had no reasonable expectancy of recall (and were not recalled) as of the eligibility period, they are ineligible to vote. By applying the test as of the eligibility date, my colleagues are treating employees who were recalled prior to the election the same as new hires.[4] The proper frame of reference for the reasonable expectancy test is, however, the time of the layoff. The Board looks at the employer's past practice and the events surrounding the layoff such as what the employee was told and the reason for the layoff (i.e., seasonal, to retool, discontinuance of an operation, etc.). I see no good reason in law or policy why the eligibility period should be the cutoff date for application of the test.[5]

For the above reasons, I would continue to follow *Sylvania Electric Products*, 91 NLRB 296, 297 (1950), in which the Board stated, ''We have held that laidoff employees who are rehired prior to the date of an election shall be considered as only temporarily laid off, and therefore eligible to vote in the election.'' The Board found it unnecessary to decide whether the employees had a reasonable expectancy of recall.[6] In addition, I do not consider the result in *Gerber Plastic Co.*, 110 NLRB 269 (1954), inconsistent with my view of the law. In that case laid-off employees were rehired to different jobs, not recalled to their former or substantially equivalent positions.[7]

For the foregoing reasons, I would find that employees who were laid off but who were recalled and working prior to the election were only temporarily laid off. Accordingly, I would reverse the Regional Director and find that the employees in question are eligible to vote.

MEMBER DEVANEY, dissenting.

I agree with my dissenting colleague that we should continue to follow the rule set out in *Sylvania Electric Products*, 91 NLRB 296 (1950), in which the Board stated that it would regard laid-off employees rehired prior to the election as only temporarily laid off and therefore eligible to vote in the election. I also agree with my dissenting colleague that, in the circumstances of the present case, the three employees who were on layoff on the eligibility cutoff date should be eligible to vote in the election because they were recalled to substantially equivalent positions prior to the date of the election.

I write separately, however, because I find it unnecessary to pass or comment on whether the layoff was viewed as permanent or temporary when it was effected or on the analytical framework and timing of the reasonable expectation of recall test applied by the majority. As to the former, because both permanently and temporarily laid-off employees recalled to work prior to the election are eligible to vote under *Sylvania*, I find it unnecessary to decide retrospectively the status of the laid-off employees at the time of the layoff. As to the latter, the only eligibility requirement under *Sylvania* is that the laid-off employees be recalled prior to the date of the election. Thus, the reasonable expectation of recall test is inapplicable in such circumstances and I see no reason to discuss it here.[1]

Finally, I note that the majority asserts that only through application of the reasonable expectancy of recall test can an employer be deterred from ''unit packing.''[2] Although I agree that such a danger exists, I find that it is not of sufficient weight to justify the result that bargaining unit employees should be

[4] Any employee, whether or not previously employed by the Employer, who was employed in the unit and working on the eligibility and election dates is an eligible employee.

[5] In *D. H. Farms Co.*, 192 NLRB 53, 54 (1971), reaffd. 206 NLRB 111, 113 (1973), the Board held, ''It is well-established Board law that the voting eligibility of laid-off employees depends on their expectancy of reemployment as of the date of the election.'' See also *Allstate Mfg. Co.*, 236 NLRB 155 (1978), which found that at the time of the election an employee had a reasonable expectation of recall based largely on the fact that two other employees had been recalled prior to the election.As stated above, I would find that the reasonable expectancy test is applicable only if the employee has not in fact been recalled prior to the election. If an employee has a reasonable expectancy of recall in the near future, the layoff is considered to be temporary, at least for a reasonable period, and the employee is eligible to vote even if the employee is never recalled. If, however, at the time of the layoff the employee has no reasonable expectancy of recall but nonetheless is recalled prior to the election, the employee is eligible to vote in the election. Conversely, the employee who has no reasonable expectancy of recall is ineligible if the employee is not recalled and working prior to the election. Because of the need for certainty in election results, postelection events, of course, will not affect the employee's eligibility.

[6] In *St. Joseph Lead Co.*, 66 NLRB 561, 563 (1946), the Board held that employees who had no reasonable expectancy of recall were ineligible to vote ''unless these employees are rehired or reinstated . . . prior to the date of the election.'' Similarly, in *Whitcomb Locomotive Co.*, 60 NLRB 1160, 1164 (1945), the Board held that if any of the terminated employees should be rehired prior to the election, ''their previous termination shall be considered temporary.''

[7] As *Tony's Trailer Service*, 257 NLRB 878 fn. 3 (1981), is inconsistent with my position, I would overrule it.

[1] I note, however, that the majority finds the result in *Sylvania* ''illogical, because the occurrence of subsequent events cannot change the expectation of recall that actually existed on the eligibility date.'' I must emphasize that we are not engaged in a course on logic, but in an attempt to deal with real world situations in a fair and equitable manner. In this light, I would find it senseless to exclude from voting employees recalled prior to the election merely because at one point there was no reasonable expectation that they would be recalled. Indeed, because the recall of the laid-off employees rendered the layoff temporary in fact, my colleagues' inquiry into the employees' expectation of recall is now academic.

[2] In the present case, it is uncontested that the Employer's recall of the three laid-off employees was made in good faith.

disenfranchised merely because they were on layoff as of the eligibility cutoff date. In this regard, I emphasize that, unlike the situation where an employer attempts to ''unit pack'' by hiring new employees, the recall of laid-off employees is subject to close scrutiny that can readily reveal whether the employer's recall is made in good faith. Thus, one can examine whether the recall is justified by the employer's changed business prospects and economic outlook and whether the recall is conducted in an impartial manner, i.e., in accord with seniority or past practice. In such circumstances, I believe the danger of ''unit packing'' is slight and outweighed by the fundamental right of the recalled employees to vote in the election.

For the above reasons, I would reverse the Regional Director and find that the laid-off employees who were recalled and working prior to the election are eligible to vote in the election.